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No. 98-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WALTER J. THOMAS, *et al.*,
Petitioners,

v.

MADELEINE ALBRIGHT, Secretary,
Department of State,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CLASS OF AFRICAN-AMERICAN FOREIGN SERVICE OFFICERS SUBJECT TO THE CONSENT DECREE IN THOMAS v. ALBRIGHT, AMICUS CURIAE, IN SUPPORT OF THE RESPONDENT

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October 23, 1998

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the approximately 360 member class of African-American Foreign Service Officers employed by the State Department who are beneficiaries of the terms and conditions of the classwide settlement, embodied in a 1996 consent decree, which was approved by the district court and affirmed by the court of appeals over the objections of a small minority of individual class members. The petitioners here are six class members who believe that some, but not all, of the provisions in the consent decree were improperly negotiated and then approved by the lower courts over their objection. Amicus curiae has a strong interest in obtaining the relief which the consent decree provides, but which has not yet been implemented due to the pendency of this petition and, therefore, it opposes the petitioners' effort to overturn the decree.

SUMMARY OF THE ARGUMENT

Petitioners, in their second and third alleged reasons for granting the writ, seek to overturn the 1996 consent decree which settled, on a classwide basis, a Title VII race discrimination lawsuit originally brought against the Department of State in 1986.[2] They object to approval of the

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[1] Counsel of record for the respondent has consented to the filing of this brief, and its letter of consent has been filed with the Clerk pursuant to Rule 37. Counsel of record for the petitioners refused to consent for the reasons described in the letter attached hereto as Amicus App. 1a, i.e., that the class is properly regarded as a party, not as an amicus curiae. However, in the court of appeals, counsel for the petitioners filed a "Motion for Removal of the Entry of Appearance" by class counsel as counsel for cross-appellees, which the court granted, finding instead that the class should be treated as an amicus in the appeal. The court's order is attached hereto as Amicus App. 2a. Accordingly, the class contends that its amicus status should continue in this Court, but has no objection to being treated as a respondent. With the above understanding, counsel for a party has not authored this brief in whole or in part. No person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Consistent with the agreement which they reached with the government in a March 19, 1996 "side letter" (Pet. App. 178a-179a), counsel for amicus curiae

decree by the lower courts because they did not receive sufficient "individual relief" in that portion of decree which provided for: (1) classwide monetary relief totaling $3.8 million; (2) 17 retroactive promotions;[3] and, (3) 4 reinstatements of individuals who had previously been terminated from the Foreign Service. The essence of petitioners' complaint is that they did not get a sufficient personal share of the classwide settlement and that, as plaintiffs or plaintiff-intervenors, they had an absolute right to veto any settlement which did not satisfy their personal objectives. Moreover, they criticize counsel for the class for failing to adequately represent their interests by entering into a side agreement to the consent decree which pertained to how counsel for the parties would deal with the issue of opting out, upon which the consent decree itself was silent.

We will show, first, that a small number of plaintiffs cannot veto a classwide settlement, particularly where all the procedural and substantive requirements of a fairness hearing under Fed. R. Civ. P. 23 (e) have been satisfied.[4] We will

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continue to take no position on whether any class member had a right to opt out of the settlement, as petitioners claim in their first reason for granting the writ. We note, however, that this letter reflected a compromise reached after the government during settlement negotiations argued that the consent decree should expressly deny the right to opt out and class counsel argued that the consent decree should expressly permit the right to opt out. The letter agreement represented a compromise which preserved the right of separately retained counsel for the petitioners to argue the opt out issue to the district court. Thus, the letter agreement provided a benefit to the petitioners, not a detriment as they claim in their petition.

[3] The petition (at 3) erroneously suggests that counsel for the parties "identified" the 17 class members who would receive promotions. In fact, the consent decree itself, in Section IV(B)(1), Pet. App. 79a-80a, 123a-124a, contains an objective mechanism for selecting the promotees which is based on length of service in grade without promotion.

[4] Petitioners do not challenge the adequacy of the notice which every class member received of the terms and conditions of the consent decree before the district court approved it, nor do they claim that the district court failed to provide them a full opportunity to express their views both orally and in writing. The petitioners, moreover, were represented by their own separate counsel, not

then show that class counsel acted appropriately in seeking court approval of the consent decree after having satisfied themselves that it was fair, adequate, and reasonable to the class. Petitioners have failed to identify any "compelling circumstances," as required by Rule 10, which would warrant granting a writ of certiorari.

The district court approved the consent decree only after conducting an extraordinarily thorough examination of every provision in order to ensure that it was fair to the class and that it was not the product of collusion between counsel for the opposing parties. Pet. App. 20a-60a. It considered every aspect of petitioners' objections before affirming the consent decree, and the opinion is firmly grounded on a thorough review of the evidentiary record. The court of appeals opinion, Pet. App. 1a-19a, is equally thorough in evaluating whether the relief was fair to the class in light of all the relevant considerations. For all of these reasons, which we discuss in more detail below, this Court should deny the petition.

ARGUMENT

I. AN INDIVIDUAL PLAINTIFF DOES NOT POSSESS THE RIGHT TO VETO A CLASSWIDE SETTLEMENT

The six petitioners assert that the court of appeals did not have the power to approve the consent decree without their express consent, which they withheld because they did not receive all the relief to which they claim they were entitled.[5] The district court and the court of appeals rejected this

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undersigned class counsel, at the fairness hearing, so they cannot and do not claim that their views were not fully aired before the district court approved the settlement.

[5] Each of the six petitioners would receive substantial relief under the consent decree. Under the relief mechanism in the consent decree, 265 class members will receive an average of $10,900 apiece in "promotion damages." Pet. App. 34a. The six petitioners, as it turns out, will receive a considerably higher amount, exceeding $21,000 on average.

argument. They correctly recognized that it is inherent in a classwide settlement that some, or even all, class members will not receive 100 percent of the relief which they might receive if they chose to litigate to a conclusion their individual claims for relief. When settlement negotiations commenced, petitioners agreed with the decision to proceed on a classwide basis. Thus, their disagreement is not with the fact that a classwide settlement was eventually negotiated. Rather, they contest the failure of that settlement to provide them with sufficient restitution for alleged past acts of discrimination against them as individuals. However, the standard for approval of a class action settlement is whether it is fair, adequate, and reasonable to the class as a whole, which the lower courts held that the *Thomas* case settlement was.

Fed. R. Civ. P. 23(e) is expressly designed to protect the rights of all class members by allowing them to express their disagreement with the terms of a classwide settlement. Here, the district court held two sets of extensive hearings before preliminarily and then finally approving the settlement terms. Upon review of all of those terms, in light of the objections expressed both orally and writing by a total of 15 percent of the class, the trial court concluded that:

> Each of the issues raised by the objectors was carefully considered. Ultimately, however, in a class action, the best interests of the class as a whole must remain the paramount consideration even though some class members believe that they will not receive all the individual relief to which they believe they are entitled. After carefully considering the objections, the Court concludes that the Consent Decree as a whole is fair, reasonable, and adequate to the class. Accordingly, the Court will not deny final approval on the basis of those objections.

Pet. App. 53a. The trial court's conclusion is supported by a detailed analysis of the specific terms and conditions

governing, *inter alia*, promotions, reinstatements, and monetary relief. Pet. App. 47a-51a. The court of appeals conducted its own analysis, Pet. App. 6a-11a, and reached the identical conclusion:

> In sum, the dissidents complain about particular portions of the overall settlement and claim that they are individually entitled to more. It is the obligation of the district court, however, to evaluate the fairness of the settlement to the class as a whole. We conclude that the district court did not abuse its discretion in approving the consent decree as fair, adequate, and reasonable to the class as a whole.

Pet. App. 11a.

Petitioners are unable to identify a single instance in which a court has disapproved a class settlement on the ground that one or more plaintiffs objected to the amount of relief which they would personally receive pursuant to the settlement's terms. Nor have petitioners identified a case where a classwide settlement was overturned after a minority of the class objected to it. In fact, numerous courts have upheld class wide settlements over the objections of plaintiffs and other class members, as the district court noted. Pet. App. 52a. If this Court were to hold that a single plaintiff has an absolute veto right over a class wide settlement, it would effectively abolish the fairness hearing procedure required by Rule 23(e) since there would be no reason for such a hearing whenever a single plaintiff objected to a classwide settlement. We note, moreover, that petitioners have not shown why plaintiffs and plaintiff-intervenors are entitled to greater rights, when it comes to approving or disapproving a settlement, than other class members. They fail to provide any basis in law or fact for holding that they have a greater interest in, or power over, the terms and conditions of a settlement than any other class member.

The petitioners' claim (Petition at 11) that the court of appeals "gave no rationale for binding the petitioners" to the settlement is frivolous. The court specifically noted that, "[a] claim that individual dissenters are entitled to more money is not, by itself, sufficient to reject the overall fairness of the settlement; as we indicated above a settlement necessitates compromise." Pet. App. 9a. Equally frivolous is the claim that the petitioners' individual claims "were not addressed by the proposed settlement agreement." Petition at 11. In fact, each of the petitioners will receive a share of the $3.8 million in class-wide monetary relief which was determined based on a formula approved by the court of appeals as "eminently fair and reasonable." Pet. App. 6a. *See* n.5, *supra*. The fact that no petitioner received reinstatement or retroactive promotion is similarly a function of the operation of the settlement agreement's objective procedural mechanisms and not a result of an intent to exclude or discriminate against the petitioners. The lower courts concluded, after carefully considering all of the evidence, that class counsel had adequately represented their interests and had not colluded with the government to deprive the petitioners of relief to which they were entitled. Pet. App. 10a-11a, 42a-44a.

Finally, petitioners' claim (Petition at 11) that the court of appeals had no "supporting evidence" to justify its affirmance of the settlement and instead relied solely on "the statements of counsel," is simply not true, as even a cursory examination of the district court and appeals court decisions reveals. It is accurate that no petitioner or, for that matter, no class member put on a complete presentation of a claim for individual relief (although several objectors described incidents of discrimination at the fairness hearing), but this is

almost always the case when a lawsuit is settled before trial and even more so the case when a class action is settled.[6]

The case law upon which the petitioners attempt to rely (Petition at 11-12) in support of their alleged right to veto a class settlement does not remotely support their position, and it is easily distinguished. In *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984), this Court held that the court of appeals' dismissal of a Title VII class action for lack of evidence as to a pattern or practice of race discrimination did not preclude, on the basis of the doctrine of *res judicata*, individual class members from then proceeding in the trial court with individual claims of discrimination. The key distinction is that the classwide settlement in the *Thomas* case resolved all of the claims of individual class members. It did not, as in *Cooper*, leave them open for litigation after rejection of the class action.

Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832 (9th Cir. 1976), is equally inapposite because, as the court of appeals noted, the "teaching" of that case is simply that "the opposition of a significant number of named plaintiffs 'is a factor to be considered when approving a settlement.'" Pet. App. 10a. However, the fact that five out of nine plaintiffs in *Mandujano* opposed a proposed class action settlement was not, as petitioners imply, deemed a legally sufficient reason to require disapproval of that settlement.

Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1177 (5th Cir. 1978), holds that a plaintiff may not "ignore the wishes of the class representatives in making fundamental litigation decisions." However, immediately before this holding, the court states that, "when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class

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[6] Only two of the six petitioners were identified as class representatives in the class certification motion which class counsel filed with the district court on June 15, 1994.

to rest exclusively with the named plaintiffs." *Id.* at 1176. Thus, class counsel here acted in accordance with *Pettway* in considering the wishes of both the petitioners and all other class members before proceeding first to negotiate the settlement and then seek court approval. No court has ever held that class counsel is obligated to comply with the desires of some of the plaintiffs, particularly where 85 percent of the class did not object to the settlement.

Finally, *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper*, 445 U.S. 326, *reh'g denied*, 446 U.S. 947 (1980), is irrelevant. There, several individual plaintiffs sought to certify a class consisting of 90,000 credit card holders in order to sue a bank for imposing usurious finance charges on credit card balances. The district court denied plaintiffs' motion to certify the class. After an unsuccessful interlocutory appeal by the plaintiffs, the bank tendered payment to each individual plaintiff in an effort to moot the case. Plaintiffs refused to accept payment, but the district court nevertheless dismissed the case as moot. The court of appeals reversed, and this Court affirmed the court of appeals, holding that the plaintiffs' interest in proceeding with a class action was sufficient to overcome the bank's effort to moot their individual damage claims through payment in full of their alleged individual damages.

The factual distinction is obvious – here, a settlement was reached with the *entire class*, not just a few members of that class. The *Thomas* case settlement was approved after a fairness hearing in which dissidents were given a full opportunity to describe their concerns, which the district court and, later, the court of appeals, thoroughly considered. The decision in *Deposit Guaranty* in no way precludes this type of settlement procedure. Nor does it state that individual plaintiffs who disapprove of the amount tendered to them in a class action settlement may veto that settlement simply because they are plaintiffs.

II. CLASS COUNSEL FULFILLED THEIR OBLIGATIONS TO ALL CLASS MEMBERS

The petitioners suggest that class counsel's execution of a March 19, 1996 side letter with counsel for the State Department constituted a conflict of interest and a derogation of class counsel's duty to adequately represent the class.[7] Petitioners' discussion of the facts and circumstances surrounding the execution, terms, and disclosure of the agreement is factually misleading and does not provide legally sufficient grounds to reject the settlement.

Petitioners claim (Petition at 13) that the side letter was kept secret: "[t]he written agreement was not shared with the petitioners, class members, or the district court during the approval process." This claim is false, as shown by Exhibits attached hereto as Amicus App. 3a-6a, 7a-9a, which are pleadings filed by the government in the district court describing seven separate instances in which the petitioners and the district court were told of the existence of the side agreement and its contents.

Petitioners next claim (Petition at 13) that the side letter said that "no information would be provided to members of the class on their right to opt out of the action." In fact, clause (4) of the side letter states that class counsel "will advise class members who may wish to opt out that they may make that request to the Court. . . ." Pet. App. 178a. Thus, the side letter did not bind class counsel to silence. In fact, the side letter represented a negotiating success for class counsel on behalf of every class member who wanted to opt out. The State Department's negotiators wanted the settlement agreement to expressly state that class members would not be permitted to opt out of the settlement. Class counsel were successful, instead, in obtaining an agreement which was silent on the subject of opting out, precisely

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[7] The side letter is reprinted in Pet. App. 178a-179a.

because class counsel intended that this tactic would allow the petitioners to present their opt out argument to the district court for resolution. Moreover, the side letter did not deny information about the right to opt out as shown by the fact that 16 class members originally indicated to the district court that they wanted to opt out. Pet. App. 54a. The side letter stated that class counsel "would not advocate opt outs to class members," but it did not preclude class counsel from telling class members that they could present their opt out requests to the trial court. Through counsel retained for this purpose, they did precisely this.

Third, the petitioners claim (Petition at 13) that it was wrong for class counsel to agree in the side letter "to inform the court that the proposed settlement agreement was fair and reasonable . . . ." Petitioners overlook the fact that it was inherent in class counsel's role, having negotiated a settlement on behalf of the entire class that they believed was fair, adequate, and reasonable to the class as a whole, that they present that settlement to the court as satisfying Rule 23(e). Thus, agreeing in a side letter to urge the court to approve the settlement merely reiterated class counsel's pre-existing obligation under the law. To put it another way, if class counsel had thought the settlement was unfair and unreasonable to the entire class, class counsel would never have agreed to it or submitted it for approval.

Nothing in *Ficalora v. Lockheed California Co.*, 751 F.2d 995 (9th Cir. 1985), upon which petitioners rely, supports their view that the side letter was improper. In that case, the court of appeals found "no inquiry by the [lower] court into the questioned activities of plaintiff class counsel with respect to the named plaintiff, Ficalora." *Id.* at 997. Here, in contrast, the district court conducted a searching inquiry into the issue of whether the terms and conditions of the settlement were fair, adequate, and reasonable to the petitioners and to every other member of the class. Pet. App.

25a-38a, 42a-54a. None of the petitioners' claims of inadequacy went unexamined, as distinguished from the situation in *Ficalora*. Accordingly, there is no basis to conclude that the interests of petitioners in opting out of the settlement were sacrificed or that class counsel failed in their duty to adequately represent the class. In fact, the district court found that class counsel fulfilled their duty of adequate representation, Pet. App. 42a-44a, for reasons which it explained at length, including over 125 meetings and 1000 telephone conversations with class representatives and other class members on the subject of settlement. The fact that some petitioners got less relief than that to which they believe they were entitled is not a permissible ground for overturning a class action settlement under Rule 23(e), particularly where the vast majority of the class did not object to the settlement.

CONCLUSION

For all of the foregoing reasons, amicus curiae requests that the Court deny the Petition.

Respectfully submitted,

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October 23, 1998

APPENDIX

APPENDIX

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October 20, 1998

Mr. Warren Connelly
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Washington, D. C. 20036

via facsimile message only

Re: *Thomas v. Albright*
Docket NO. 98-326

Dear Mr. Connelly:

In reference to the above, I received your facsimile message dated October 10, 1998 which was sent on October 20, 1998. I regret that I cannot consent to your filing of an amicus brief in this action. As representatives of the plaintiffs in this action, you and the individuals for whom you seek to file have a direct interest in the outcome of this petition and were parties to the litigation below. I do not believe that you qualify as an amicus in this petition since you are a party in interest in this action.

I am sorry that you did not bring this to my attention prior to October 20, 1998. Hopefully this does not cause you too much inconvenience.

Sincerely,
/s/
Barbara B. Hutchinson

[filed Sep. 26 1997]

United States Court of Appeals
For The District of Columbia Circuit

No. 97-5004 September Term, 1997
86cvO2850

Walter J. Thomas, et al.,
Appellees

v.

Madeleine K. Albright, Secretary of State,
Appellant

Consolidated with 97-5018

BEFORE: Edwards, Chief Judge; Ginsburg, Circuit Judge; and Buckley, Senior Judge

ORDER

Upon consideration of the motion for removal of entry of appearance, the opposition thereto, and the reply, it is

ORDERED that the motion for removal of entry of appearance be granted. It is

FURTHER ORDERED, on the court's own motion, that the class be allowed to participate in this appeal as an amicus curiae. *See* D.C. Cir. Rule 29.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/
Elizabeth V. Scott
Deputy Clerk/LD

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER J. THOMAS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 86-2850 (SS)
	)	
MADELEINE K. ALBRIGHT,	)	
	)	
Secretary, Department of State,	)	
	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S RESPONSE TO PLAINTIFFS WALTER THOMAS AND ALAN B.C. LATIMER'S MOTION TO SUPPLEMENT THE PLAINTIFFS' OBJECTIONS TO CONSENT DECREE WITH NEW AND ADDITIONAL EVIDENCE

Defendant files this Response to Plaintiffs Walter Thomas and Alan B.C. Latimer's Motion To Supplement The Plaintiffs' Objections To The Consent Decree With New and Additional Evidence. Plaintiffs Thomas and Latimer wish to supplement the record with the side letter signed by class counsel and by government counsel in which class counsel agreed to take no position on the issue of whether opt outs are allowed under the settlement agreement. Defendant notes that this motion is unnecessary because the record already demonstrates that the Court and counsel for plaintiffs Thomas and Latimer were aware both of the existence of the agreement and of the existence of a letter memorializing the agreement. Defendant, however, does not object

if plaintiffs Thomas and Latimer wish to supplement the record with the letter.

First, Barbara Hutchinson, counsel for plaintiffs Thomas and Latimer, proposed in a letter dated March 20, 1996 that the notice to class members include the following statement: "Counsel for the class represented by Mr. Joseph Sellers, Michael Madigan, Warren Connelly, and Carl Anderson have taken no position on the matter of individuals opting out of the consent decree." March 20, 1996 Letter from Barbara Hutchinson to John Oliver Birch, Exhibit A. Thus, counsel for Thomas and Latimer has been award for some time of this agreement.

The record is replete with instances of where the class counsel mentioned the agreement, thus demonstrating that no one tried to hide the existence of the agreement from plaintiffs Thomas and Latimer. For example, at the Preliminary Fairness Hearing on March 19, 1996, Joe Sellers, class counsel, specifically informed the Court that the Consent Decree was silent as to the opt out issue and that class counsel had agreed to take no position on the issue. March 19, 1996 Preliminary Fairness Hearing, Exhibit A at 15-18.

Further, at the Fairness Hearing on July 15, 1996, Mr. Sellers, in response to the Court's question on whether the issue of opt outs is resolved by the Consent Decree, stated:

> Your Honor, can I just make the position of plaintiffs' class counsel clear on this. We agree that the decree is silent on this issue. We have agreed in the course of negotiations not to take a position on whether opt out is available.

July 15, 1996 Hearing, Exhibit B.

At the July 23, 1996 Fairness Hearing, Mr. Sellers again stated the following:

> Your Honor, I just wanted to make clear that as part of the terms of the agreement, counsel for the class has agreed not to take a position on whether anybody had a right to opt out. So we've agreed to stay out of this debate.

July 23, 1996 Hearing, Exhibit C. On that same day, Mr. Sellers also stated:

> [so] without taking a position on the issue of opt outs which we're not going to do, counsel for the class are not going to do, I think it's important for the Court to appreciate that there are a lot of people who are interested in this settlement, some of whom have sent letters to the Court.

Id.

At the September 19, 1996 hearing can whether to allow opt outs, when class counsel was asked whether they had anything to say on whether opt outs should be allowed, Michael Madigan responded as follows: "No, Your Honor. We agreed to be silent." September 19, 1996 Hearing, Exhibit D.

At the September 19, 1996 hearing, which Ms. Hutchinson attended, the Court and Mr. Birch, counsel for defendant, had the following dialogue:

> The Court: All right. But I thought there was something in the consent decree, and I don't have the provision, which says that it was silent on opting out?
>
> Mr. Birch: All that says -- no, it's not something in the consent decree. What that means is the parties have agreed not to put language in the consent decree, and *there is a side letter* In which the class counsel said that they would not take a position whether or not a person would be allowed to opt out. . . .

September 19, 1996 Hearing, Exhibit D (emphasis added).

Defendant also notes that a side agreement where class counsel agreed to take no position on the opt out issue was consistent with the procedure followed by the government in other class action suits. *See Eubanks v. Billington*, No. 95-5336, slip op. at 6 (D.C. Cir. April 11, 1997).

Nevertheless, plaintiffs Thomas and Latimer claim that while they knew of the existence of the agreement, they never knew a letter existed memorializing the terms of the agreement. As demonstrated above, however, Barbara Hutchinson, counsel for

plaintiffs Thomas and Latimer, was informed of the existence of the letter by Mr. Birch at the September 19, 1996 Hearing.

Thus, it is unnecessary to supplement the record because the record already demonstrates that a side letter existed. Moreover, the actual language of the side letter does not provide any information that was not already previously disclosed to plaintiffs Thomas and Latimer. Accordingly, plaintiffs Thomas and Latimer could not have been prejudiced by the failure to include the actual letter in the record. Nevertheless, should plaintiffs Thomas and Latimer still desire to supplement the record with the letter itself, defendant does not object.

Respectfully submitted,

/s/

ERIC H. HOLDER, JR., DC BAR #303115

United States Attorney

/s/

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/s/

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Office of Legal Adviser

Department of State

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER J. THOMAS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 86-2850 (SS)
	)	
MADELEINE K. ALBRIGHT,	)	
	)	
Secretary, Department of State,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S SUPPLEMENTARY RESPONSE TO PLAINTIFFS WALTER THOMAS AND ALAN B.C. LATIMER'S MOTION TO SUPPLEMENT THE PLAINTIFFS' OBJECTIONS TO CONSENT DECREE WITH NEW AND ADDITIONAL EVIDENCE

Defendant files this Supplementary Response to Plaintiffs Walter Thomas and Alan B.C. Latimer's Motion To Supplement The Plaintiffs' Objections To The Consent Decree With New and Additional Evidence in order to add two additional examples of plaintiffs' awareness of the terms of the agreement between class counsel and defendant concerning class counsel's position on opt outs. First, on June 11, 1996, counsel for eighteen plaintiff-intervenors, Theresa L. Watson, filed an opposition to the proposed Consent Decree. That brief was served on class counsel for the plaintiffs, counsel for the defendant, and Ms. Barbara B. Hutchinson, counsel for, among others, Walter Thomas and Alan Latimer. In that opposition, Ms. Watson at page 3 states that:

> [P]laintiffs' counsel in 1995 began to present themselves as "class counsel", agreeing with the

> defendants that there would be no provision for opt outs, which should be available in this type of lawsuit under Rule 23 (b)(3); that they would no longer represent named plaintiffs on this issue in this case or on appeal, and that they would advise this Court that the issue is on appeal in Civil Action No. 82-0400 in the U.S. District Court for the District of Columbia.

Exhibit A. That description is accurate and almost paraphrases the side letter between counsel for the defendants and class counsel. It clearly demonstrates that all parties and the Court were aware of the terms of the side letter at the time the Consent Decree was approved.

Second, at the July 23, 1996 Fairness Hearing, the following exchange took place while counsel were discussing the briefing schedule on the opt out issue:

> Ms. Hutchinson: And the reason the other plaintiffs' counsel are not participating is because they have agreed that they will remain silent. That's my understanding of their position.
>
> Mr. Birch: The class counsel, yes.

Exhibit B. This exchange further demonstrates Ms. Hutchinson's awareness of the agreement between class counsel and defendant on the opt out issue.

Respectfully submitted,

/s/

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